UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

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NEW YORK UNIVERSITY,	:	
Employer,	:	
-and-	:	Case No. 2-RC-23481
GSOC/UAW, Petitioner.	: :	
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NEW YORK UNIVERSITY'S OPPOSITION TO PETITIONER'S REQUEST FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM OF LAW

New York University ("NYU") respectfully submits this memorandum in opposition to Petitioner's Request for Leave to File Supplemental Memorandum of Law, which urges the Board to abandon the policy of not reversing precedent absent three-votes to do so. In another pending case, involving Polytechnic Institute of New York University ("Polytechnic"), International Union, Automobile, Aerospace and Agricultural Implement Workers of America, UAW, also represented by Thomas Meiklejohn, Esq., has filed a substantially identical request. In both cases, the respective Regional Directors have dismissed the petitions seeking to represent graduate students in reliance on the Board's holding in *Brown University*, 342 NLRB 483 (2004). Petitioner's request is inappropriate and should be denied for multiple reasons.

First, regardless of how it is termed, Petitioner is actually seeking to submit a reply brief. Petitioner is not entitled to file a reply brief under the Board's Rules and Regulations (the "Rules"). Section 102.67(b) of the Rules provides, "within 14 days after service [of the Regional Director's decisions] any party may file a request for review with the Board in Washington D.C." Section 102.67(d) provides "Any party may, within 7 days after the last day on which the request for review must be filed, file with the Board a statement in opposition thereto…." There is no provision for a reply brief.

The lack of any right to file a reply brief in the context of a request for review stands in sharp contrast to other circumstances in which the Rules permit reply and/or sur-reply briefs by special leave of the Board. *See, e.g.,* § 102.46(h) (concerning summary judgment motions); § 102.67(a) (concerning the filing of briefs to the Regional

Director at the close of a hearing); § 102.67(i) (concerning cases transferred directly from a Region to the Board for a decision). In the context of a request for review, however, the rules do not provide for the filing of a reply brief with or without special leave of the Board.

Second, and in any event, Petitioner's delay in making its request to submit a supplemental memorandum of law warrants denial of the request. By rule, a Request for Review must be made within 14 days after service of the Regional Director's decision and any opposition is required to be filed 7 days thereafter. *See* §102.67(b) and (d) of the Rules. Petitioner's request was filed more than three months after the filing of NYU's Opposition to Petitioner's Request for Review in this matter. Petitioner asserts that its request is prompted by Chairman Liebman's departure from the Board when her term expired on August 27, 2011, and an argument made in Polytechnic's Opposition to Petitioner's Request for Review in that case. But Petitioner did not file its request until almost two months after Chairman Liebman's departure from the Board and a full month after Polytechnic's submission on September 20, 2011. Petitioner offers no explanation or justification for this delay in filing its request, which is particularly inexcusable in light of the short time periods for filing a request for review and opposition.

Third, and most significantly, Petitioner's request for the Board to utilize the two instant cases as a mechanism to disavow longstanding Board policy is patently inappropriate. Petitioner's memorandum of law is in response to the statement in Polytechnic's Opposition to Petitioner's Request for Review that "In light of the Board's well-established policy requiring a three-member majority to reverse precedent, Polytechnic further suggests that it would be inappropriate and serve no purpose for the

Board to grant the Request for Review in this case seeking reversal of *Brown* if the current members of the Board are unable to do so." (Polytechnic Opp. Mem. of Law at 12-13) Petitioner does not dispute the policy.

Instead, Petitioner makes only the far-fetched argument that the Board should disregard this longstanding and bi-partisan Board policy because current political conditions make it unlikely there will be a three-member majority to overturn the decision of the Regional Director. Petitioner's argument is not addressed to any purported merits of its underlying case but instead only at achieving the end that it desires by any means necessary, regardless of the damage done to the institutional integrity of the Board.

If a change in policy of the type suggested by the Petitioner's proffered memorandum were ever to be considered, it should not be in the context of a case where — as here — the change could affect the outcome of the decision. Rather, such a change should only be considered — if at all — in the context of a public process, such as rulemaking, in which individuals and entities not involved in the instant proceedings may voice their opinions as to the potential effect such a dramatic change in policy may have on other Board matters and the long-term credibility and institutional integrity of the Board.

Finally, if the Board were to accept Petitioner's memorandum of law – which it should not – it should permit the respective Employers and the public, as *amici curiae*, sufficient time to respond to the suggestion that the Board disregard its longstanding policy of requiring at least three votes to reverse precedent.

For the reasons stated above, NYU requests that the Board deny Petitioner's

Request for Leave to File a Supplemental Memorandum of Law.

New York, New York October 26, 2011

Respectfully submitted,

PROSKAUER ROSE LLP

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CERTIFICATE OF SERVICE

This is to certify that copies of the within Opposition to Petitioner's Request for Leave to File Supplemental Memorandum of Law in Case No. 2-RC-23481 has been served by electronic mail on this date on:

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Dated: October 26, 2011 New York, New York

> /s/ Brian S. Rauch Brian S. Rauch